"APPENDIX TO STATEMENT AS TO JURISDICTION ON APPEAL."

IN THE

# SUPREME COURT

OF THE

## State of Washington

*Appeal from the Judgment and Decree of the Superior Court of Okanogan County, State of Washington.*

TWISP MINING & SMELTING COMPANY, a Corporation,
*Appellant,*

vs.

CHELAN MINING COMPANY, a Corporation; SEATTLE-FIRST NATIONAL BANK, acting through its Spokane & Eastern Branch, as Receiver of the Alder Group Mining & Smelting Company, a dissolved corporation, and Methow Gold Corporation,
*Respondents.*

No. 28798

SUPPLEMENTAL PETITION FOR REHEARING EN BANC

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"APPENDIX AS TO STATEMENT AS TO JURISDICTION ON APPEAL"

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Comes now appellant, Twisp Mining & Smelting Company, and respectfully petitions the

court for a rehearing of this cause and a rehearing En Banc before the entire Supreme Court for the following reasons:

In our Petition for Rehearing which has been filed herein, we urged three main points as follows:

(1) The Departmental Opinion in holding that there was a quorum present in the meetings of January 17, 1934, and January 30, 1934, is wholly inconsistent with the Articles of Incorporation of the Twisp Company and of the statute.

(2) The Departmental Opinion in deciding that the Twisp Corporation is now estopped from urging the invalidity of the proceedings at that meeting and of the deed executed pursuant thereto, fails to take into account the true principles of estoppel and wholly ignores the facts as shown by the record.

(3) The Departmental Opinion ignores the fact that there was never any performance by

the Chelan Company of the things to be done by it in consideration for the alleged deed.

We shall discuss these points in their order.

I.

The Departmental decision substantially holds that the by-laws of a corporation are on a higher plane than the articles of incorporation themselves. In order to reach the conclusion that the Department did reach, it is necessary for them to give full force to a by-law that was entirely contradictory to and inconsistent with the articles of incorporation. This was done without any citation of authorities and without any discussion as to whether or not the two were inconsistent, and if this decision is allowed to stand, it will revolutionize corporation law in this State and create a situation where no stockholder of a corporation may rely on the articles of incorporation themselves for his protection, but on the contrary, he will be subject to the whim and caprice of any Board of Directors which may see fit to change or

alter the by-laws of the corporation from time to time. It is a matter of importance, far greater than this case itself. The case involves only the parties primarily interested therein, but the principle of law which the Department by its decision adopts, if followed to its logical conclusion, will nullify the effect of the charter or articles of incorporation of any company organized under the laws of this State. The members of a corporation have a constitutional right to rely on the charter of the company being given full force and effect. The United States Constitution guarantees them that right. It is true they may be amended by the procedure specified for that purpose, but they may not be amended by the legislature or by a court under the guise of judicial construction.

In *Bergman v. St. Paul Mut. Bldg. Assn.*, (Minn.) 13 N. W. 120, the court held:

> "The authority to pass by-laws is, as a matter of course, authority to pass such as are consistent with the articles of incorporation and not a power to subvert the

law of corporate existence." Also see Morewitz, Private Corporations, section 367, 368.

The Department in this instant case, construed, applied and enforced Article II, Section 6 of the by-laws of the Twisp Company, as a law, which superseded and nullified the provisions of the Uniform Business Corporation Act in regard to what constituted a legal quorum of a Board of Seven Trustees and as so construed, applied and enforced was repugnant to the Fourteenth Amendment of the Federal Constitution.

The portion of the articles of incorporation of appellant company necessary to this discussion is as follows:

> "ARTICLE V. The powers of the corporation shall be exercised through and its business shall be conducted by a Board of Seven Trustees; * * *"

The by-laws in so far as they affect the case, are as follows:

> "ARTICLE II. Section 1. The business and property of the company shall be man-

aged and controlled by a board of not less than three nor more than seven trustees, who must be stockholders of the company, and who shall be elected annually by ballot at the annual meeting of the stockholders and shall hold office for one year and until their successors are elected and qualified. The trustees shall act only as a board, and the individual trustee shall have no power as such.

"Section 6. *Quorum.* A majority of the Board of Trustees, for the time being in office, shall constitute a quorum for the transaction of business, but, if at any meeting of the Board there shall be less than a quorum present, a majority of those present may adjourn the meeting from time to time until a quorum shall be present."

The statute in force at the time is found in Remington's Revised Statutes 3803-31, Para. 3 (Supp.) as follows:

"3. The number, qualifications, terms of office, manner of election, time and place of meeting, and the powers and duties of the directors may, subject to the provisions of this act, be prescribed by the articles or by-laws. Except as otherwise prescribed in the articles or by-laws:

d. a majority of the board of directors shall be necessary to constitute a quorum for the transaction of business, and the acts of a majority of the directors present at a meeting at which a quorum is present shall be the acts of the board of directors.

e. the board of directors may, by resolution passed by a majority of the whole board, designate two or more of their number to constitute an executive committee, who, to the extent provided in said resolution, shall have and exercise the authority of the board of directors in the management of the business of the corporation."

Now it must be perfectly clear that Section 1 of the by-laws is entirely inconsistent with the articles of incorporation. The very charter of the corporation itself provides that the business of the company *shall* be exercised through and its business *shall* be conducted by a board of seven trustees. The question of law presented is whether the charter or by-laws shall prevail. The Department apparently held that both were in full force and effect. The opinion does not discuss the question as to whether the two were inconsistent. It was passed over without the

citation of any authority and without even considering the cases cited in appellant's brief which lays down the rule that in order to be binding at all, a by-law must be consistent with the charter of the company.

Was it the thought of the writer of the opinion that the charter of the company and the by-laws were consistent? Was it the opinion of the Department that if the by-laws were inconsistent with the charter, that the by-laws would prevail? We do not know which of these positions was adopted by the Department, but one or the other, or both, must have been answered in the affirmative in order to reach the conclusion that the Department did that the meeting of the Twisp Company held on January 30, 1934, was a legal meeting at which a quorum was present.

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## WERE THE TWO PROVISIONS INCONSISTENT?

It seems to us too clear for argument that the by-law as construed, applied and enforced by the Department is not consistent with the charter or section 2803-31, Para. 3, Subd. (d) of Rem. Rev. Stat. (Supp.). If the business of the corporation must be conducted by its board of seven trustees, how can it be said that the board can consist of from three to seven trustees? The answer is obvious. We do not believe, therefore, that it could have been the intention of the Department to hold that these two provisions could be consistent.

## IF THE TWO PROVISIONS ARE INCONSISTENT, CAN THE BY-LAW PREVAIL OVER THE CHARTER?

If it were the opinion of the Department that the directors or trustees may make a by-law which entirely changes the charter, we submit that it is contrary to all of the authorities, and

contrary to all conception of corporate law which has heretofore been had. It is especially provided that there is no way to amend the articles of incorporation, except in the method provided by statute, and that is not by making a by-law inconsistent with the charter. It is clear from the Uniform Business Corporations Act that once the articles of incorporation have been filed, they are controlling, and that no by-law can be made either by the shareholders or by the board of directors where it is in any way inconsistent with law or with the articles of incorporation. Remington's Revised Statutes, Section 3803-26 (Supp.):

> "1. The shareholders of a corporation may make and alter by-laws not inconsistent with law or the articles of incorporation.
>
> 2. The authority to make by-laws may be expressly vested by the articles of incorporation in the board of directors subject to the power of the shareholders to change or repeal such by-laws.
>
> 3. The board of directors shall not make or alter any by-laws fixing their qualifica-

tions, classifications, term of office or compensation."

All of the authorities lay down the same rule. It is a well-settled principal that all by-laws which are inconsistent with the charter or with the governing law are void. 13 Am. Jur. 286, Section 156.

Fletcher Cyc. on Corporations (Permanent Ed.) vol. 8, p. 723, Section 4190, provides:

> "By-laws, to be valid, must be consistent with the terms and spirit of the charter of the corporation—the word 'charter' being here used in its broadest sense without regard to whether the statutory rights to be a corporation is obtained by a special act or a general statute. A by-law which is not consistent with the charter, but in conflict with and repugnant to it is void."

We submit that the by-law which seeks to permit the doing of corporation business by a board of trustees from three to seven, is entirely inconsistent with the articles of incorporation and is void.

If we are correct in this contention, then at the time the crucial meeting was held, the whole board of trustees of the Twisp Company had to consist of seven members, and the statute in force at the time states precisely what is necessary to have a quorum, where it is said:

> "d. a majority of the board of directors shall be necessary to constitute a quorum for the transaction of business, and the acts of a majority of the directors present at a meeting at which a quorum is present shall be the acts of the board of directors."

Under the charter which controlled, the board of directors could not consist of less than seven and a majority of that board could not be less than four. There might be a vacancy in office, there might be less than seven trustees actually qualified at any one time, but under the charter of the corporation and under the statute in force at that time, it took four directors who are actually present at a meeting to do any business whatever.

Section 6, Article II of the By-Laws as con-

strued, applied and enforced, does not help the Departmental Opinion. It is just as inconsistent with the articles of incorporation as is Section 1 of Article II. Under the articles, the required trustees in office at any time were seven. It is true that Section 1 of Article 2 of the by-laws made a different provision, but as we have shown, that section is inconsistent with the charter and void, and so is Article 2, Section 6 inconsistent and void if it means that there could be a board of trustees of less than seven, and if it means that less than four trustees could transact business.

*In re Arcadia Dairies, Inc.*, (Del.) 135 Atl. 846, 848, the court held:

> "The first grounds upon which the general validity of the claim is attacked is that the director's meeting which authorized the bonds secured by a mortgage was an invalid one in that only one director was present in person, the other two being represented by proxy. All action taken at that meeting, it is contended was void. This is true, because directors of a corporation cannot act by proxy."

We were not present when the by-laws were adopted, but it is a safe guess that what happened is this: the articles were drawn and as is often the case, the by-laws were copied from an old set, or from a form which the attorney who prepared the papers had in his possession, and it was not noticed that this particular portion of the by-laws was inappropriate for use under the particular articles which were filed with the Secretary of State. Article 2, Section 6 of the by-laws is also inconsistent with the statute. The statute is definite in its provisions.

> "A majority of the board of directors shall be necessary to constitute a quorum for the transaction of business." Rem. Rev. Stat. 3903-31, Para. 3, Subd. "D."

It does not say a majority of the Board of Trustees *for the time being in office.* If that had been the intention of the legislature, it would have incorporated it in the statute. In other words, the articles of incorporation definitely determine the number of trustees of the corporation and the statute determines what is

necessary to constitute a quorum of those trustees, and any by-law inconsistent with the statute is of necessity void. Fletcher's Cyclopedia on Corporations (Permanent Ed.) Vol. 5, p. 69, Section 3013, provides:

> "A by-law providing what shall constitute a quorum is invalid if it conflicts with the provisions of a statute on the subject, and yields to the statute. * * *."

In *Gentry-Futch Co. v. Gentry* (Florida) 106 So. 473, the court held:

> "In support of the decree in the court below holding the meeting of October 18 void, it is contended by the appellee, Gentry, that there was not sufficient stock legally represented at the meeting to represent a quorum, that is, that at most only 50 or 51 per cent of the stock was represented at the meeting, *whereas the by-laws of the corporation provided that no business should be transacted at any meeting without there being 75 per cent of the stock represented.* This provision of the by-law is void, being in conflict with section 4082 of the Revised General Statutes of 1920, which reads: 'A majority of the stock shall constitute a quorum at stockholders' meet-

> ings.' This announces a general statutory policy and principal, which, of course, cannot be changed by a corporate by-law." (Italics ours)

In *Bruch v. National Guarantee Credit Corporation* (Del.) 116 Atl. 738, the court passed on this precise question, saying:

> "The board of directors of this corporation consisted of seven. * * * Three directors met at a special meeting. By resolution unanimously adopted these minority directors authorized the President of the corporation to file an answer in receivership cause instituted against it by complainant. There were four vacancies on the board. Those vacancies could have been easily filled. * * * The fact is they filled no vacancies. * * * I am therefore of the opinion that there being no quorum of the board of directors at the meeting which assumed to authorize the filing of the answer in this case, the answer filed by the President is not the answer of the corporation."

There can be no question but that the meeting of January 17, 1934, and the meeting of January 30, 1934, were not legal meetings un-

der the charter and under the statute. In neither meeting was a quorum present. The mere fact that Mr. Cull who at that time was a trustee and officer of the Chelan Company, for which the deed was procured by Mr. Strong, advised those present that five trustees only were necessary for the corporation, did not make it a fact. The quorum was not present. The three members constituted a minority of the Board of Directors as fixed by the charter of the corporation, and the statute expressly provides that a minority cannot constitute a quorum. It follows that the purported acts of the board of directors at these meetings was not the act of the corporation at all and that the resolution passed at said meetings did not legally authorize the execution of the deed. It makes no difference whether you call the deed a forged deed or a deed made without authority. In either event, it had no validity. We submit that the Department in holding the meeting of January 30, 1934, to be a legal meetings, clearly failed to grasp the fact that the by-laws relied on by it were entirely inconsistent with the char-

ter and that it was also inconsistent with the statute, and in justice, not only to the appellant, but to all persons holding corporate stock, the question should be submitted to the court en banc for further consideration.

The Departmental Opinion is squarely contradicted by the Supreme Court of California, in *Hotaling v. Hotaling*, 224 Pac. 435, where that court held:

> "Under the statute it required a majority of the board shall constitute a quorum. The articles provided that nine shall compose the board of directors. Five met at the meeting, but one was interested because the deed to be executed was to transfer certain property of the corporation to one of the five directors present. By the resolution adopted by the remaining four the president and secretary were authorized to execute a deed of conveyance to Richard M. Hotaling, one of the members of the board present, of real estate belonging to the corporation. The deed was executed and recorded. The question of the validity and effect of the deed formed the subject-matter of this action. The trial court held that the deed was void and the appellate

court affirmed the trial court's ruling, and in doing so used this language: * * * 'the deed under which Richard M. Hotaling claims as an attempted corporate act, it must, we think, be conceded to have been invalid from its inception for the reason that its execution was never effectively authorized by the Board of Directors of the corporation in whom was vested the *sole power to give such authority.*' We conclude that there was not a quorum of said directors capable of authorizing the execution of the deed, and that the grantees in such deed are estopped to claim any right or title to the property purported to be conveyed by such a deed." (Italics ours)

Also in *Enright, as Trustee in Bankruptcy v. Heeksher,* 240 Fed. (2d) (C. C. A.) 963, that same question was passed upon and the court held:

"It seems from the minutes that there were five directors present, but Mr. Munford was interested in this transaction, and left the room or retired while the directors were considering this proposition, and was not present when it was acted upon. Of course, it would constitute a quorum if he was there, even though he did not vote; but if he left the room, so as to leave only four

directors present, and five was required, it seems clear there would have been no meeting at the time the action was taken, therefore there could be no finding by the directors, as required by section 49 of the Corporation Act or Law, that the value of the property transferred was equal to the value of the stock issued. The resolution was held to be a nullity."

The decision of the Department gives an interpretation to Section 6, Article 2 of the by-laws, which provides a majority of the board of directors *for the time being in office,* shall constitute a quorum for the transaction of business, that was obviously never intended. To properly construe the by-laws, they must be read together and when so read, it is perfectly apparent that this section refers to the Section 1, Article 2, where it is provided that the directors may be from three to seven in number. If that were permitted by the charter of the corporation, there would be some logic in so construing it, but when you take the actual facts in the case at bar, where the charter itself required seven trustees and read into this by-law

a meaning that would permit a majority of trustees who happened to then be in existence to transact business for it, you might have a situation where only one trustee would be left and he would, according to the Department's opinion, be fully qualified to run the corporation. He could decide as Mr. Cull did, that he didn't need any more trustees and could proceed to bind the corporation to anything that he might desire until someone in authority might call a stockholders' meeting to elect more trustees. Naturally, one person in authority would not desire to fill the Board where he could do as he liked without hindrance. It is obvious to us that when these two sections of the by-laws are read in conjunction with the charter and in conjunction with the statute in force at the time, it must be held that the Department has given the construction to the by-law, Section 6, Article 2, that is not only out of harmony with good sound public policy, but is also entirely contrary as to what was ever intended by the people who formed the corporation.

II.

## THERE WAS NO ESTOPPEL

The Departmental Opinion, after holding that there was a quorum present at the meeting of January 30, 1934, goes on to further assert that even if that meeting were not a valid meeting, appellant is estopped to question the rights of respondents. In so holding, it seems to us that the Department has entirely ignored one of the principal elements of estoppel. The necessary elements of an equitable estoppel are set forth in 21 C. J., at p. 1119, Estoppel, Para. 122, as follows:

> "Essential Elements—a. In General. In order to constitute this kind of estoppel *there must exist a false representation or concealment of material facts;* it must have been made with knowledge, actual or constructive, of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted upon; and the party to whom it was made must have relied on or acted upon it to his prejudice. To constitute an 'estoppel in pais' there

must concur an admission, statement, or act inconsistent with the claim afterward asserted, action by the other party thereon and injury to such party. There can be no estoppel if either of these elements are wanting. They are each of equal importance." (Italics ours)

All of these elements must concur to create an equitable estoppel. We call attention to the very first one. In order to constitute this kind of estoppel, there must exist a false representation or a concealment of material facts. Now, what misrepresentation was made to Mr. Strong in this deal? What misrepresentation was made by the Twisp Company to the Chelan Company? There is nothing whatever in the record (Minutes of those meetings in January, 1934, Exhibit No. 7 herein) that shows that there was any misrepresentations or any concealment of an existing fact, by the Twisp Company or any authorized officer or agent of the Twisp Company. The most that could be said is that Mr. Cull, a director and assistant secretary of the Chelan Company represented that the meet-

ing at which the deed was authorized was a valid and legal meeting, but it must be remembered that both Mr. Strong and Mr. Cull were present at that meeting, and also that Mr. Cole, the personal attorney for Mr. Strong, was also present, and each of these gentlemen had full knowledge of the requirements of the articles of incorporation of the Twisp Company, and they had knowledge of its by-laws for the question which is raised here came up at that meeting, and it was decided that at the first meeting, there was not a quorum present.

It is perfectly apparent that the by-laws and the charter were examined and that they all determined that a further meeting was necessary and at that meeting, that the question of the necessary number of trustees was openly discussed, and it was decided that five trustees were all that were necessary, but that decision was made by Mr. Cull, the attorney and assistant secretary, and a trustee for the Chelan Company. Mr. Cull alone, of all persons, knew all about the existing facts pertaining to the organ-

ization of the Twisp Company and of the facts and the making of its by-laws, and all of its corporation papers were apparently in his possession. Whatever Mr. Strong took and whatever the Chelan Company took, were taken with full knowledge of all of the facts and things which were done at these meetings and with full knowledge of all of the facts which might effect the legality of the acts done at the meeting.

Appellant is now claiming that the meeting at which the Twisp Company's deed was authorized, was an illegal meeting, and is urging it on facts which were fully submitted to the Chelan Company and its officers and attorney at the time the transaction took place.

In 19 C. J., Secundum, p. 483, Section 1011, the following rule is laid down:

> "In order to bind a corporation on the grounds of estoppel there must have been some act or conduct on its part, through its authorized officers or agents, which amounts to a representation that the person assuming to act for it in a particular transaction has authority to do so, and which was de-

> signed to injure another party, who is ignorant of the truth and of his own rights, and who relied on the faith of such acts and declarations, and was misled to believe in the authority of such person to his subsequent injury; * * *."

Under this rule, there was no act of this corporation, through its authorized officers or agents for the very simple reason that none of the officers or agents could be authorized to perform any act at a meeting at which a quorum was not present. We must keep in mind, of course, that three trustees of the Chelan Company and Mr. Strong, its president, were present at this meeting, and its assistant secretaries and attorney were there and knew that a quorum was not present. Many authorities might be cited on the question of what is necessary in order to create an estoppel, and there are many cases decided by our own court, but none of them differ from the general rule herein set forth, and it would serve no good purpose in this argument to multiply authorities.

In the Departmental Opinion, the inference

is made that John Magney and Roy Magney, who now control the Twisp Company, knew of these meetings of January 17 and January 30, 1934, and of all the transactions with reference to this property thereafter, and stood by without objection for a period of five years. The record, it seems to us, is entirely to the contrary. It must be conceded that Mr. Cull is adverse to the appellants in this case and yet Mr. Cull testified as follows:

> "Q. Did you personally, or did any of the directors of the Company personally in your presence, ever discuss this Strong deal with the Magneys?
>
> A. No, I will confess I don't know they ever knew anything about it; they didn't have any opportunity to." (St. 80)

Now, if Mr. Cull had the books and records of the corporation, and Roy Magney and John Magney had not examined them, and if in his opinion, they had no means of knowing the transaction which had taken place, how does the court without evidence, determine that they did know? Naturally, these directors who put the

deal through, knew that it was against the wishes of appellants and it is quite natural that they would not advise him of what had been done. The corporation itself was dormant during that period. Roy and John Magney were a large part of the time in Colorado. We feel that the inference left by the Departmental Opinion, is not supported by the record, and that this case should be re-argued so that the whole court may have the advantage of such re-argument and may ascertain the actual facts as they were presented before the lower court. We feel that the briefs of appellant could not have made the facts as clear to the Department as they should have been made, and that the client should have the right to have the case decided with all of the facts called specifically to the attention of the court.

## III.

## THE CHELAN COMPANY DID NOT PERFORM ITS CONTRACT

We need not go further on the question of estoppel, but in justice to our client, we are required to state that the Department was entirely wrong in holding that the Chelan Company or Mr. Strong had performed its part of the proposed deal or that it had paid the consideration for the transfer. The Department opinion states, in Washington Devisions, No. 4, page 243, as follows:

> "Mr. Strong formed the Chelan Mining Company, pursuant to his agreement with Twisp; and, after the conveyance by Mr. Strong and wife to Chelan Mining Company, that Company issued to Twisp 250,000 shares of its stock, which were delivered to Mr. Cull and receipted for by him. Twisp still holds this stock."

Now, the record shows that 250,000 shares of stock were issued by the Chelan Company, and that they were held by Mr. Cull who was the Chelan Company's assistant secretary and at-

torney (St. 55 and 56), and that this certificate was held until April 5, 1939, and then was offered to the Twisp Company and it was refused. Mr. Cull at the time of the issuance of this certificate was not an officer of the Twisp Company and was not in sympathy with appellants, and we feel that the statement made by the Department that the Twisp Company still holds this stock, does violence to the record. It was never offered to it until proceedings were started to institute the present action. While the suggestion is made that the Chelan Company proceeded to pay off and settle claims against the property, these claims were not paid from any money advanced by Chelan Company or by Mr. Strong. The record shows that the Twisp Company's own personal property was used to settle what claims were settled (St. 302). The record further shows that the Chelan Company did no assessment work (St. 231). If any money was advanced by the Chelan Company to pay claims or liens, or if it was out anything, the outlay was made by the company with full knowledge of the facts

surrounding the issuance of the deed, and it was not in any way misled.

In *Lammer v. Arkansas Power & Light Company* (Ark.) 116 S. W. (2d) 361, the court held:

> "Where the party knew that the agent or officer had no authority to make the contract, and even though the corporation knew that the purchaser was expending considerable money in making preparations to receive the power, yet it would not estop the company from denying the existence of the alleged contract."

Likewise in *T. P. Ranch Co. v. Gueydan and Riley* (La.) 87 So. 234, the court held:

> "Where the lessee knew that the lease was not authorized by the lessor corporation because entered into by only two of the three directors, the silence of the directors, including the third director, as to the invalidity of the lease, did not estop the corporation on the grounds of acquiescence from denying the validity of the lease, since silence did not put the lessees in any worse position than they already occupied."

In Volume 116, Wash. Dec., at page 234, the

statement is made in substance that the contract under which the Twisp Company claims (Ex. 4) was forfeited in an action brought by Mr. Morrill on August 24, 1932. It is conceded that the Twisp Company was not made a party to this proceeding. The contract which John Magney had originally received, had been assigned by him to the Alder Development Company, and it in turn had assigned the contract to the Twisp Company. At the time the action was brought by Mr. Morrill, neither Mr. Magney, nor the Alder Development Company, nor the Alder Metals Corporation had any interest in the contract. This action was of no importance as far as the Twisp Company was concerned, since it was not made a party, unless its interest was not known to the persons who brought the action and unless its assignment was not recorded at the time the action was brought, and the Department opinion goes on to state "Mr. Morrill stated that at the time he started the above action, there was nothing of record showing that the Twisp Company had or claimed any interest

in the property." But the writer of the opinion entirely ignores the definite proof that the assignment was recorded in Book 9 of Miscellaneous Records at page 307, on June 27, 1932, in the office of the Auditor of Okanogan County, Washington (St. 10). This testimony came from the County Auditor of Okanogan County, and he had the record book in his hands at the time the testimony was given, and all counsel conceded that the assignment was so recorded. We are at a loss to know why the writer of the Departmental Opinion overlooked the definite proof on this question from the County record itself and emphasized in his opinion a bare statement of Mr. Morrill who was in no sense the custodian of the County records and apparently had made no careful investigation to see what was recorded and what was not and the Department further ignored the record (St. 282-285 and Supplemental Record).

## IV.

## RESPONDENTS ARE NOT GOOD FAITH PURCHASERS

It is clear from the record, that the Receiver and Methow Gold Corporation, respondents, derived their claimed rights in this action from a "Quit Claim Deed" from the Chelan Mining Company, as vendor, of date of January 17, 1939.

In *Reynolds v. Moseley,* 32 Fed. (2d) (8th C. C. A.) 979, holds:

> "The law is well settled that one cannot be deemed an innocent purchaser of an interest in real property, who buys with knowledge of an outstanding title or of outstanding rights superior to his own; and knowledge of facts sufficient to put a reasonable prudent man upon inquiry, which if followed up with reasonable diligence, would lead to the knowledge of such outstanding title or rights, is equivalent to knowledge of the outstanding title or outstanding rights, thereunder."

An this court in *Jones v. Berg,* 105 Wash. 69, 177 Pac. 712, holds:

> "If she, the vendee, in a quitclaim deed,

chose to take a quitclaim deed from the owner, * * *, it is plain to us that she got no better title than the vendor possessed, * * *."

The Chelan Mining Company, as shown herein, having no right, title or interest to convey, the Receiver and the Methow Gold Corporation obtained no adverse claim to appellant's rights, and cannot be deemed innocent purchasers without notice of the invalidity of the Chelan Mining Company's claimed rights.

We feel that we have shown that the Department was in error in all of the three particulars to which we have called attention, and we feel that we have shown also that due to the great length of the record, all of the matters which should have been called to the attention of the court have not been properly called to its attention, and in order that justice be done, it is essential that a rehearing be had before the whole court.

Respectfully submitted,

W. G. BOLAND,
E. A. CORNELIUS,
*Attorneys for Appellant.*

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1943**

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# No. 213

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TWISP MINING & SMELTING COMPANY, A CORPORATION,

*Appellant,*

*vs.*

CHELAN MINING COMPANY, A CORPORATION; SEATTLE FIRST NATIONAL BANK, ACTING AS RECEIVER OF THE ALDER GROUP MINING & SMELTING COMPANY, A DEFUNCT CORPORATION; AND METHOW GOLD CORPORATION, A CORPORATION,

*Appellees.*

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## ADDITIONAL AUTHORITIES IN SUPPORT OF THE JURISDICTION OF THIS COURT OF THIS APPEAL, WITH COMMENTS.

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In *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 66 Law Ed. 239, at 242, this Court held:

> "In the state court the plaintiff did not simply claim a right or immunity under the Constitution of the United States, but insisted that, as to the transaction in

> question, the Kentucky Statute was void, and therefore unenforceable, because in conflict with the commerce clause of the Constitution. The court did not accede to the insistence, but applied and enforced the statute. Of course, that was an affirmance of its validity when so applied. * * *. That the statute was not claimed to be invalid in toto and for every purpose does not matter. A statute may be invalid as applied to one state of facts, and yet valid as applied to another. * * *. The provisions quoted from the jurisdictional section show that in cases where the validity of a state statute is drawn in question because of alleged repugnance to the Constitution, the mode of review depends on the way in which the state court resolves the question. *If it be resolved in favor of the validity of the statute, the review may be on writ of error, and if it be resolved against the validity, the review can only be by writ of certiorari.* The provisions take no account of the particular grounds or reasons upon which the decision is put." (Italics ours.)

Section 3803-11, Para. 1, of Rem. Rev. Statutes (Sup.) of the Uniform Business Corporation Act of the State of Washington went into full force and effect on January 1, 1934, and expressly provided:

> "A corporation which has been formed under this act, or a corporation which existed at the time this act took effect, shall have the capacity to act possessed by natural persons, *but such a corporation shall have authority to perform only such acts as are necessary or proper to accomplish its purpose and which are not repugnant to law.*" (Italics ours.)

Section 3803-26, Para. 1, of Rem. Rev. Stat. (Sup.), provides:

> "1. The shareholders of a corporation may make and alter by-laws not inconsistent with law and the articles of incorporation."

and Article V of the Articles on Incorporation of the appellant, Twisp Mining & Smelting Company, provides:

> "The powers of the corporation shall be exercised and its business shall be conducted by a Board of Seven Trustees."

and Section 3803-31, Para. 3, Subd. (d) of Rem. Rev. Stat. (Sup.), provides:

> "A majority of the board of directors shall be necessary to constitute a quorum for the transaction of business, and the acts of a majority of the directors present at a meeting at which a quorum is present shall be the acts of the board of directors."

The trial court and the State Supreme Court in this instant case were faced with the fact, that the Articles of Incorporation of the Twisp Mining & Smelting Company fixed its Board of Trustees, as a Board of Seven Trustees and therefore the law as applied to this corporation provided that there must be four trustees actually present at any meeting of that Board of Seven Trustees to legally transact any business of any kind of the Twisp Mining & Smelting Company.

The statute under the provisions of Section 3803-11. Para. 1, of Rem. Rev. Stat. (Sup.), of the Uniform Business Corporation Act, expressly provided that the Corporation had no power or authority to perform any act which was repugnant to law. Of necessity then, the Corporation had no power to enact any By-Law which was inconsistent with the Articles of Incorporation or the provisions of Section 3803-31, Para. Subd. (d), of Rem. Rev. Stat. (Sup.), of the Uniform Business Corporation Act.

Article 2, Sec. 6, of the By-Laws in question in this instant case provides:

> "A majority of the Board of Trustees, for the time being in office, shall constitute a quorum for the trans-

> action of business, but, if at any meeting of the Board there shall be less than a quorum present, a majority of those present may adjourn the meeting from time to time until a quorum be present."

It appears from this record that the Chelan Mining Company was organized on January 26, 1934, and that Robert H. Strong, James Cole and James O. Cull, became directors of that corporation, and on January 29, 1934, Robert H. Strong was elected its president and James Cole and James O. Cull were elected its assistant secretaries, and these three gentlemen were present at the purported special trustees meeting of the Board of Seven Trustes of the Twisp Mining & Smelting Company of date of January 30, 1934 (R. 7, 8 & 9).

It further appears from this record that James O. Cull, a director and assistant secretary of the Chelan Mining Company, advised Mr. Strong, Mr. Cole, and the three minority trustees present at that purported special meeting of the Board of Seven Trustees that the Board of Trustees of the Twisp Mining & Smelting Company at that time consisted of Seven Trustees but that there were two vacancies on the Board of Seven Trustees at that time (R. 10), and the record further shows that Mr. Cull construed the By-Law heretofore quoted herein to mean that:

> "A majority of the trustees then in office, constituted a quorum, and that the three minority trustees of the then Board of Seven Trustees could legally proceed to transact the business of the Twisp Mining & Smelting Company" (R. 10).

The State Supreme Court stated in its opinion (R. 18 & 19), that the Twisp Mining & Smelting Company, made the following assignment of errors on its appeal from the Judgment and Decree of the trial court, to-wit:

> "The trial court erred in holding that three members of a board of seven trustees, at an informal gather-

ing, legally represented the appellant; in holding in substance that those three trustees had power and authority to appoint an assistant secretary; in holding there was any by-law of appellant which in any way prescribed something different from that which is in the statute in regard to what constitutes a quorum; in assuming there was a legal special meeting of the board of seven trustees held on January 30, 1934; in further holding that those three trustees had any power or authority to pass a resolution of any kind which would be binding on appellant, and in not holding that the acts of those three trustees were ultra vires and absolutely void from their inception; and in holding that there ever was any legal consummation of the illegal transaction of Robert H. Strong with the three trustees; in holding that the deed made in the name of appellant as grantor and Robert H. Strong, as grantee, on January 31, 1934, was a valid deed, and in not holding that it was a forged deed; * * *."

and the State Supreme Court in its opinion further states:

> "It is true the articles do provide the powers of the corporation shall be exercised through a board of seven trustees. It is also true that the articles do not say how many trustees shall constitute a quorum to transact business. However section 6, of article 2, of the by-laws, provides that a majority of the board of trustees, for the time being in office, shall constitute a quorum for the transaction of business, unless such by-law was in conflict with Rem. Rev. Stat. (Sup.) Section 3803-31, paragraph 111" (R. 36).

The State Supreme Court, in adopting that view, overlooked the fact that the Articles of Incorporation prescribed a Board of Seven Trustees, and that the statute provided that there must be a majority of that board, or four trustees, to constitute a quorum to transact business. There could not be a different board prescribed by any

By-Law for that is inconsistent with the Articles of Incorporation and law on the subject.

The State Supreme Court further states in its opinion:

> "It seems to us perfectly plausible and reasonable that a situation such as here presented was contemplated at the time the by-laws were passed. The next reference to Fletcher's Cyc. of Corporations is vol. 2, page 206, sec. 421, from which appellant quotes" (R. 37 & 38).

Fletcher's Cyc., on Corporations, Vol. 2, page 206, Section 421, provides:

> "The general * * * rule being the number necessary to constitute a quorum under a by-law which provides that a majority of the directors shall be necessary and sufficient to constitute a quorum, is the majority of the entire board, notwithstanding there may be vacancies at the time." Hotaling *v.* Hotaling (Cal.) 224 Pac. 435, then the State Supreme Court further stated:
>
> "This quotation is not applicable here, for the reason that it covers a situation where the by-laws provide "That a majority of the directors shall be necessary and sufficient to constitute a quorum," *not a majority of the trustees then in office, as in the instant case*" (R. 38). (Italics ours.)

Again the State Supreme Court overlooked the undisputable fact, that the Articles of Incorporation provided for the Board of Seven Trustees. Since the statute provided that a quorum must be present to do business there must be at least four trustees present to constitute a quorum, and under Section 3803-11, Para. 1, *supra*, the corporation had no power or authority to pass any by-law that was repugnant to law, and Section 3803-37, Section 3803-38 of Rem. Rev. Stat., (Sup.), of the Uniform Business Corporation Act provides that the Articles of Incorporation can only be amended by a resolution of the stock-

holders after that resolution is duly filed with the Secretary of State and a certificate of amendment issued by the Secretary of State. That was not done in this instant case. See, *in re Dolgeville,* 160 N. Y. 500, 55 N. E. 287, where that question was passed upon, and the court held:

> "The statutory provisions regulating the increase or decrease of directors of a corporation required the calling of a meeting of the stockholders, and authorized the determination of the question by a vote of those owning a majority of the stock and provided that "The proceedings of such meeting shall be entered in the minutes of the corporation and a transcript thereof, verified by the president and secretary of the meeting, shall be filed in the office where the original certificate of incorporation were filed." After careful examination of the origin and history of the statute, and due consideration of the object which the legislature aimed to accomplish by the several steps which it required shall be taken to effectuate an increase or reduction in the number of directors, we have concluded that it must be held that the number of directors of the Dolgeville Electric Light & Power Company was not reduced until after the filing of the transcript of the minutes of the corporation with the Secretary of State and the County Clerk, and as that was not done until after these proceedings were instituted it follows that the petition presented to the Court was not signed by a majority of the directors, and therefore the Court was without jurisdiction to make any order in the premises."

It is clear then, that the controlling authority of Article 2, Section 6, of the By-Laws was in violation of the Uniform Business Corporation Act and that the decision made based upon said violation of the State law deprived the stockholders of their property without due process of law. This is repugnant to the provisions of the 14th Amendment of the Constitution of the United States.

That construction placed the By-Law on a higher level than the Articles of Incorporation and law governing this instant case, and deprived the appellant corporation and its stockholders of their property and property rights without due process of law within the meaning of the 14th Amendment to the Constitution of the United States.

In other words, the State Supreme Court assumed legislative power to repeal the provisions of the Uniform Business Corporation Act, by giving authority to a By-Law providing that a majority of the trustees then in office shall constitute a quorum for the transaction of business of the appellant corporation in excess of its power so to do, and its act in so doing was repugnant to the provisions of the 14th Amendment to the Constitution of the United States and resulted in depriving the stockholders of the appellant corporation of their property and property rights without due process of law within the meaning of the 14th Amendment to the Constitution of the United States and of the equal protection of the provisions of the Uniform Business Corporation Act of the State of Washington.

Section 3803-11, Para. 1, of Rem. Rev. Stat., (Sup.), expressly provides that no corporation of the State of Washington has any power or authority to perform any act which is repugnant to law, and when the Articles of Incorporation fixed the number of the Board of Trustees of the appellant corporation and the law fixed that there shall be a majority of the Board present to constitute a quorum to do business, it means that the entire Board of Seven Trustees must be present to transact any business of the Twisp Mining & Smelting Company. This corporation, by the law under which it obtained its charter, had no power or authority to pass any by-law that was in conflict or inconsistent with its Articles of Incorporation and Section 3803-31, Para. 3, subd. (d) of the Uniform Business Corporation Act, and the attempt to do an act in excess of the

corporate power constituted an *ultra vires* act under the authority of *Central Trans. Co.* v. *Pullman Car Co.*, 139 U. S. 24, 35 Law ed. 55, and therefore the attempted transaction of Chelan Mining Company, a corporation, with the minority trustees was absolutely null and void from its inception.

It is manifest, when one stops to think, if a corporation has the power to prescribe its own laws through its By-Laws there would be no necessity for the State to pass any laws on the subject, and likewise the State Supreme Court has no power to repeal any law of the State of Washington, and appellant respectfully submits that this instant case falls within the provisions of Section 237 (a) of the Judicial Code of the United States and this Supreme Court of the United States has jurisdiction of this appeal of this instant case.

Respectfully submitted,

CLARENCE C. DILL,
E. A. CORNELIUS,
*Attorneys for Appellant.*

We, the undersigned attorneys for appellees, do hereby acknowledge receipt of a copy of the above Additional Authorities In Support of the Jurisdiction of the Supreme Court of the United States of this appeal:

DILLARD & POWELL,
*Attorneys for Appellee, Seattle First National Bank, acting through its Spokane & Eastern Branch, as Receiver for Alder Group Mining & Smelting Company, a defunct corporation.*

Date of service July 8, 1943.

CHAS. A. JOHNSON,
*Attorney for Appellee, Chelan Mining Company.*

Date of service July 10, 1943.

ADAM W. GILLESPIE,
*Attorney for Appellee, Methow Gold Corporation.*

Date of service July 8, 1943.